Petition

81-1322

No.

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IN THE

Supreme Court of the United States

October Term, 1981

MICHAEL PALAMONE,
THOMAS GERRY,
and
GUY GERRY,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioners, Michael Palamone, Thomas Gerry and Guy Gerry, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on November 16, 1981.

QUESTION PRESENTED FOR REVIEW

Whether the Due Process Clause requires proof beyond a reasonable doubt that the individual named in the indictment and the person on trial for the offense are one and the same?

ALL PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Michael Palamone
Thomas Gerry
Guy Gerry
United States of America (Office of the United States Attorney for the Western District of Pennsylvania)

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OPINION BELOW

No opinion was rendered by either the Court of Appeals or the United States District Court for the Western District of Pennsylvania.

The Court of Appeals issued Judgment Orders, which appear in the Appendix hereto.

JURISDICTION

The judgments of the Court of Appeals were entered on November 16, 1981. In Palamone's case, a petition for rehearing *en banc* was denied on December 14, 1981. This petition for certiorari was filed within sixty (60) days of the entry of the judgments.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

On July 1, 1980, Michael Palamone, Thomas Gerry and his son, Guy Gerry, and two other individuals, Harry Fuchs and Michael George, were indicted at criminal number 80-96 in the United States District Court for the Western District of Pennsylvania. The grand jury named Palamone and Messrs. Gerry in one count of the eight count indictment, and charged them with a violation of 21 U.S.C. §846.

Specifically, count one alleged that from April 1979 until January 1980, they conspired to distribute and possess with the intent to distribute cocaine, a schedule II narcotic drug controlled substance.

On September 22, 1980, a jury trial was convened before the Honorable Barron P. McCune, District Judge. On September 30, 1980, the jury returned a verdict of guilty as to Palamone and Messrs. Gerry. Palamone was sentenced to serve a three-year period of probation and to pay a $6,000.00 fine. Thomas Gerry was sentenced to serve a three-year term of imprisonment, and Guy Gerry was sentenced to serve a five-year term of imprisonment. The judgments of sentence were affirmed by the United States Court of Appeals for the Third Circuit on November 16, 1981.

At trial, the Government's evidence disclosed that in April, 1979, a search was conducted at the residence of Edith Forristall during which a quantity of cocaine was seized. Ms. Forristall testified that the contraband belonged to Harry Fuchs. She also witnessed, in September 1979, a meeting of "Guy, Ironman and Harry Fuchs" concerning Fuchs owing $25,000; at this time, Fuchs handed Guy an 8½" by 11½" envelope.

Michael George testified for the Government that he made various purchases of cocaine from Fuchs and Scott Martin. Coleman Bergmark also testified that he purchased an ounce of cocaine from Fuchs on October 8 or 9, 1979. On October 13, 1979, Fuchs told Bergmark over the telephone that he had just talked to the "man" and was going to call him back, and later Fuchs called Guy Gerry.

On October 30, 1979, Martin delivered $2500 to Guy Gerry in Akron, Ohio, in repayment of a loan Gerry had made to Fuchs. At that time, Martin testified that he met Tom Gerry. On November 1, 1979, Martin also said he went to Akron and discussed with Guy Gerry the possibility of buying cocaine from him in the future.

Between November 1 and November 5, 1979, Martin said he called Michael Palamone to borrow money from him, and Martin went to Palamone's office and was loaned approximately $2,000. On November 5, 1979, Martin said he met Guy Gerry in Ohio where Martin purchased three (3) ounces of cocaine for $4,800 ($1,600 an ounce). On November 7, 1979, Martin gave Fuchs two grams and sold the remainder of the cocaine to Bergmark.

On November 8, 1979, Martin testified that he borrowed additional monies from Palamone. Martin then gave Palamone seven (7) grams of cocaine.

On November 23, 1979, Fuchs gave Martin $3,000 which Martin used to buy cocaine with Fuchs' knowledge. On November 29, 1979, after receiving a telephone call from Guy Gerry concerning the purchase of cocaine, Martin testified that he went to Akron, Ohio, and met Tom Gerry at the airport. Martin said he purchased one-quarter pound of cocaine from Tom Gerry at $1,600 an ounce. Martin returned to Pennsylvania and gave some of

the cocaine to Fuchs. On November 27, 1979, Martin met Palamone and returned $2,500.00 which had been loaned to him plus $1,000 interest. They then agreed to another $2,000 loan, and Martin gave Palamone six (6) grams of cocaine.

On approximately December 21, 1979, Martin said he called Guy Gerry and arranged to meet Tom Gerry in Ohio, at which time he purchased two ounces of cocaine for $3,800. Back in Pennsylvania, Martin met with Michael George and sold him two ounces of cut cocaine for $3,800. On December 22, 1979, Martin met Palamone and gave him some cocaine; Palamone told Martin to keep the loan monies for another two weeks. In January of 1980, Martin met Tom Gerry in Ohio, and Martin purchased three ounces of cocaine from him. Shortly thereafter, during the month of January, 1980, Martin made sales of cocaine to various individuals.

In their defense, both Thomas Gerry and Guy Gerry denied participation in any drug transactions or any illegal activity with Scott Martin, and they claimed no knowledge of such activity.

ARGUMENT

The decision below conflicts with the Due Process Clause requirement that identification of the accused as the person who committed the offense, which is an element of the offense, be proven beyond a reasonable doubt.

Petitioners contend that the Court of Appeals has rendered a decision which conflicts with the Fifth Amendment and an applicable decision of this Court.

This Court has held that "... [t]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged". *In Re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1973 (1970). Here, it is the position of Michael Palamone, Thomas Gerry and Guy Gerry that they were convicted of the crime alleged in the indictment without proof of each fact necessary to constitute that particular offense, and thus their convictions are based on insufficient evidence.

The indictment alleged that Palamone, Messrs. Gerry and others conspired to distribute and possess with intent to distribute cocaine. They contend the evidence presented by the Government is insufficient because it fails to adequately identify them as the persons accused of committing this offense.

It is clear the evidence, to warrant a conviction, must demonstrate beyond a reasonable doubt the identity of the accused as the individual who committed the crime. 23 C.J.S. Criminal Law §920. As the Court in *United States v. Fenster*, 449 F. Supp. 435, 439 (D.C.Mich. 1978), noted:

> "It is axiomatic that an element to be proven in every case is that the person who stands before the

> court in the position of defendant is the one whom the indictment or information accuses and to whom the evidence is supposed to relate."

In Palamone's case, there is no such demonstration, and the required element is absent from the record. No witness identified Palamone. Only Scott Martin, who appeared for the Government, mentioned Palamone's name, but he was not directly asked to testify in regard to the accused's identity. Neither Martin nor any other witness ever pointed out Palamone, sitting in open court, as the person to whom he was referring. This departure from the ordinary trial procedure causes a fatal defect in the Government's case.

It is recognized that an explicit, in-court identification of the defendant is not absolutely necessary,

> "... so long as the evidence is sufficient to permit the inference that the person on trial was the person who committed the crime. *Delegal v. U.S., 329 F.2d 494 (5th Cir.), cert. denied,* 379 U.S. 821, 85 S. Ct. 44, 13 L.Ed. 2d 32 (1964); *Griffin v. U.S.,* 329 F.2d 495 (5th Cir.), *cert. denied,* 379 U.S. 822, 85 S.Ct. 44, 13 L.Ed.2d 32 (1964)." *United States v. Darrell,* 629 F.2d 1089, 1091 (5th Cir. 1980).

Here, Palamone argues that the evidence is not sufficient to permit the inference that he is the individual who committed the offense. The record is simply devoid of any facts which could allow it.

In *Darrell,* even with only one defendant on trial, the Court refuted the Government's argument that "... the jury could infer that the person seated at the counsel table with defense counsel was one and the same person as the person referred to in oral and documentary evidence ...". 629 F.2d at 1091. Here, while there were four

defendants on trial, the Government may attempt nevertheless to elicit some significance from the fact of the presence in court of Michael Palamone, the accused. As in *Darrell*, this is plainly not evidence justifying the necessary inference.

Likewise, it is urged that mere similarity of names, without more, cannot ordinarily settle the question of identity once it is raised. *United States v. Fenster, supra*, 449 F. Supp. at 439.

In sum, the facts of record and the inferences justifiably arising therefrom are insufficient to link petitioner Palamone with the Palamone named in the indictment, and therefore his conviction cannot be sustained.

As to the Gerrys, they argue the requisite element was not proven beyond a reasonable doubt during the Government's case-in-chief. They acknowledge some identification testimony was presented by the Government, but their argument is that said testimony was not adequate under the circumstances. As to Guy Gerry, witness Forristall said "Guy" and certain others visited Fuchs' residence in September, 1979; she said she saw him in the courtroom, "sitting here to my right" and wearing "teal pants, sport coat, gray and blue shirt". Witness Martin pointed out Guy Gerry as "[t]his individual closest to me" with "[g]ray tweed suit, dark hair" Witness Bergmark described Guy Gerry as "[m]edium build, brown hair, brown eyes . . . long brown hair [a]bout my size, 5'11". As to Thomas Gerry, the only identification testimony during the Government's case came from witness Martin who said he saw Thomas Gerry in court and described him as "[t]his gentlemen [sic] here in the brown suit".

The critical omission in this evidence is the lack of any recognition that correct identifications were made. In other words, neither the prosecutor nor the trial court confirmed on the record that the witnesses were accurate. The ordinary, and necessary, procedure calls for some recitation that the defendants were in fact properly identified. Absent this confirmation, it is argued that the relationship between the accused and the person who committed the crime, a requisite element of the offense, is not established *beyond a reasonable doubt.*

It is noted, as above, that neither presence in court during the trial, *United States v. Darrell, supra,* nor similarity of names alone, *United States v. Fenster, supra,* permit an inference that the accused is the person referred to in the evidence. Thus, the record made by the Government, whether facts in evidence or inferences arising therefrom, is inadequate to provide the necessary link.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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January, 1982

APPENDIX

APPENDIX
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1015

UNITED STATES OF AMERICA
v.
HARRY FUCHS, THOMAS GERRY, GUY GERRY
MICHAEL GEORGE, MICHAEL PALAMONE
MICHAEL PALAMONE, *Appellant*

(Criminal No. 80-00096-05-W.D.Pa.-Pittsburgh)

Submitted Under Third Circuit Rule 12(6)
November 13, 1981

Before: SEITZ, *Chief Judge*, GARTH, *Circuit Judge*, and CAHN, *District Judge.**

JUDGMENT ORDER

After consideration of the contentions raised by appellant, to-wit, that (1) the evidence presented by the

*Edward N. Cahn, Judge of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

Certified as a true copy and issued in lieu of a formal mandate on December 22, 1981.

SALLY MRVOS

Test: Clerk, United States Court of Appeals for the Third Circuit

government is insufficient to sustain the conviction because it fails to identify the accused, Michael Palamone, as the person who committed the alleged offense and (2) the conspiracy conviction should be reversed because there exists a fatal variance between the evidence and the specific allegations in the indictment, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

SEITZ
Chief Judge

ATTEST:
M. ELIZABETH FERGUSON
Chief Deputy Clerk

DATED: November 16, 1981

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1015

UNITED STATES OF AMERICA
v.
HARRY FUCHS, THOMAS GERRY, GUY GERRY
MICHAEL GEORGE, MICHAEL PALAMONE
MICHAEL PALAMONE, *Appellant*

(Criminal No. 80-00096-05-W.D. Pa.-Pittsburgh)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS GARTH, HIGGINBOTHAM, SLOVITER, *Circuit Judges*, and CAHN, *District Judge.**

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the

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*Edward N. Cahn, Judge of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ SEITZ
Chief Judge

Dated: December 14, 1981

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1013
No. 81-1014

UNITED STATES OF AMERICA
v.
HARRY FUCHS, THOMAS GERRY, GUY GERRY
MICHAEL GEORGE, MICHAEL PALAMONE
THOMAS GERRY, *Appellant in No. 80-1013*
GUY GERRY, *Appellant in No. 80-1014*

(Criminal No. 80-00096-02/03-W.D.Pa.-Pittsburgh)

Submitted Under Third Circuit Rule 12(6)
November 13, 1981
Before: SEITZ, *Chief Judge*, GARTH, *Circuit Judge*, and CAHN, *District Judge.**

JUDGMENT ORDER

After consideration of the contentions raised by appellants, to-wit, that (1) the motion for judgment of acquittal should have been granted because the evidence presented by the government was insufficient to sustain the conviction for failing to adequately identify the defendants, Thomas Gerry and Guy Gerry, as the per-

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*Edward N. Cahn, Judge of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

sons who committed the alleged offense and (2) in view of the substantial prejudice arising from the joinder of defendants, the lower court abused its discretion by denying the motions for relief from prejudicial joinder, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,
/s/ SEITZ
Chief Judge

ATTEST:
/s/ M. ELIZABETH FERGUSON
Chief Deputy Clerk

DATED: November 16, 1981